

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-548531-D2 AND ALL  
OTHER SEAMAN'S DOCUMENTS

Issued to: Antonio V. POLACK

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1744

Antonio V. POLACK

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 3 April 1968, an Examiner of the United States Coast Guard at New York, N. Y., suspended Appellant's seaman's documents for two months outright plus four months on eight months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a first class waiter on board SS UNITED STATES under authority of the document above captioned on or about 18 February 1968, Appellant wrongfully battered one Roque Mendez, another first class waiter, and one Jerome Morris, the first class headwaiter and Appellant's immediate superior.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of the UNITED STATES and the testimony of two witnesses, Mendez and Morris.

In defense, Appellant offered in evidence his own testimony and that of two character witnesses who testified both for Appellant and against Mendez.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of two months outright plus four months on eight months' probation.

The entire decision was served on 6 April 1968. Appeal was timely filed on 26 April 1968, but the Examiner's order was not complied with until 20 June 1968. Appeal was perfected on 11 September 1968.

FINDINGS OF FACT

On 18 February 1968, Appellant was serving as a first class

waiter on board SS UNITED STATES and acting under authority of his document while the ship was at sea.

At about 1300 on that date, Appellant and Roque Mendez became involved in an argument while working in the first class dining room. Jerome Morris, the first class headwaiter, ordered them to the pantry. In the pantry, Appellant beat Mendez with his fists.

Morris, attracted to the scene by the sound of falling and breaking serving ware, went to the pantry, saw Mendez falling or crouching, and was hit on the shoulder by Appellant's swinging blow.

### BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the Examiner erred in accepting the testimony of the witnesses against Appellant and not accepting the testimony of Appellant himself and that of the character witnesses who were pro-Appellant and anti-Mendez.

It is said also that the Examiner misconstrued the testimony of the witness Morris and should have construed it as showing only that Appellant "brushed" Morris aside as he left the pantry.

APPEARANCE: Abraham E. Freedman, New York, N. E., by Templeton Fowlkes, Esq.

### OPINION

#### I

Without reference to authorities, it is hornbook law that credibility of witnesses is a matter for determination by the initial trier of facts. The Examiner in this case made such a determination. Absent a showing that his determination is so arbitrary or capricious as to render his decision insupportable as a matter of law, it will be affirmed.

There is no showing in this record on appeal that the Examiner should not as a matter of law have accepted the testimony of the witness against Appellant.

#### II

Once an examiner has accepted evidence, it only remains to be determined whether the evidence, taken by itself and without regard to evidence which the examiner has rejected, is "substantial evidence" as the term is used in administrative law.

There can be no question that the testimony of two persons allegedly assaulted and battered by another, if it tends to prove assault and battery, is "substantial evidence."

### III

Appellant's special attack on the findings on the "Morris" specification merits a footnote. The credibility of the witness Morris was not challenged at hearing or on review. Appellant seeks, however, to have the testimony of this witness construed to mean no more than that Appellant merely "brushed" Morris off in his effort to get out of the pantry.

To "brush" aside, by physical force, a person who has a right to be where his is is assault and battery. Thus, even on the view of the evidence most favorable to Appellant, the specification was proved. (It is noted, of course, that the Examiner did not accept the more favorable construction of the "Morris" episode and thus the matter is actually controlled by Parts I and II of this Opinion.)

### ORDER

The order of the Examiner dated at New York, N. Y., on 3 April 1968, is AFFIRMED.

W. J. SMITH

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